

Just in case I was wrong in my view that the appellants did not have a real prospect of winning their suit, I considered the second principle laid down by Lord Diplock in the *American Cyanamid* case (*supra*) i.e., whether damages in the measure recoverable at common law would be an adequate remedy. This is in effect a restatement of the established rule that a plaintiff should not be granted an interlocutory injunction unless he is able to show that if it were not granted he would suffer irreparable damage – see *Johnson v. Shrewsbury and Birmingham Railway Co.*⁽¹⁾ According to the appellants' general manager, Michael Leong Choon Fai, the appellants would suffer considerable hardship if the injunction were not continued and the respondents implemented another shut-down which would adversely affect the reputation, goodwill and commercial prospects of the centre for which pecuniary damages would not be an adequate remedy. The appellants have not pleaded that they will suffer irreparable damage if the injunction were not continued. On the other hand, counsel for the respondents claimed that their clients would be driven into bankruptcy or liquidation on account of insolvency if they were forced to continue operating their business in view of the high rents which they have to pay and also because of the current recession.

In the above premises, I found that irreparable damage would be suffered by the respondents if the injunction were continued. The appellants would be adequately compensated by the damages recoverable at common law and I was satisfied that the respondents would be in a financial position to meet such damages. In any event the appellants are not claiming damages in Suit No. 3900/85 against the respondents.

As the appellants had failed to pass the tests in the guidelines provided by Lord Diplock in the *American Cyanamid* case I dissolved the interim injunction granted on April 25, 1985 and ordered costs against the appellants to be taxed.

Appeal dismissed.

Solicitors: Francis Khoo & Lim; Selvadurai Pala Krishnan & Partners; Mallal & Namazie; Low & Yap.

PANACHAND & CO. (PTE.) LTD. v. RIKO INTERNATIONAL PTE. LTD.

[D.C.A. (Thean J.) August 30, 1985]

[Singapore – District Court Appeal No. 12 of 1985]

Contract – Novation – Goods sold and delivered – Mistake in invoice – Mistake accepted by both parties – Whether novation – Whether respondent entitled to set-off from purchase price – Set-off – Burden of proof.

On or about January 13, 1981, the defendants/respondents sold to the plaintiffs/appellants 543 bags of Cummin seeds for \$75,051.60. The plaintiffs claimed to have negotiated from the defendants a 10% discount of the purchase price. Accordingly, the plaintiffs paid the defendants \$67,545.90, less \$7,505.70, representing the discount. The defendants appeared to have accepted the payment.

On January 30, 1982, Exim Agencies Pte. Ltd. ("Exim"), an associate company of the plaintiffs, agreed to sell to the defendants 188 bags of Turkish gallnuts for \$53,942.40. The invoice was by mistake made out in the name of the plaintiffs as the vendor. The defendants did not consider a rectification necessary and accordingly paid the plaintiffs \$46,438.70. They refused to pay the balance of \$7,505.70, contending that it was a set-off from the plaintiffs' debt to them in an equivalent amount as the balance of the purchase price for the Cummin seeds sold to the plaintiffs in January 1981.

The learned District Judge dismissed the plaintiffs' claim for this amount as he held that the contract was made between Exim and the defendants and the plaintiffs were not "a party privy to this contract", and there was no evidence of any novation of the contract. The plaintiffs appealed.

Held: (1) parties are bound by their pleadings and by the agreement or admissions made in Court; the Court cannot decide on issues not raised in the pleadings;

(2) plainly the parties, namely, Exim, the plaintiffs and the defendants, must be taken to have agreed that the contract was to be treated as having been made between the plaintiffs and the defendants. There was a novation of the contract and the parties intended that the contract was between the plaintiffs and the defendants;

(3) on the basis of the pleadings and the agreement reached between the parties in Court, the burden of establishing the set-off rested squarely with defendants. The defendants had failed to discharge the burden.

Case referred to:

(1) *Kiaw Aik Hang Ltd. v. Tan Tien Choy* [1964] M.L.J. 99.

I DISTRICT COURT APPEAL.

Bryan Manaf Ghows for the plaintiffs/appellants.

Bala Chandran s/o Kandiah for the defendants/respondents.

Thean J.: This is an appeal against the judgment of the learned District Judge given on March 12, 1985 in which he dismissed the plaintiffs' claim against the defendants with costs. At the conclusion of the hearing of the appeal, I allowed the appeal; set aside the judgment of the learned District Judge; gave judgment for the plaintiffs in the sum of \$7,505.70 and awarded costs against the defendants here and below. I also made a consequential order for repayment to the plaintiffs or their solicitors of the deposit paid into Court as security for costs of the defendants.

The facts insofar as they are relevant are these. On or about January 13, 1981 the defendants sold to the plaintiffs 534 bags of Cummin seeds for a total sum of \$75,051.60 ("the first transaction"). PW 1, a director of the plaintiffs, who concluded the purchase, claimed that he had negotiated from the defendants a discount of 10% of the purchase price, and accordingly the plaintiffs paid to the defendants only a sum of \$67,545.90, leaving a balance of \$7,505.70, which according to PW 1 represented the discount agreed upon. The defendants appeared to have accepted the sum of \$67,545.90 in payment of the Cummin seeds sold; at any rate there was no demand by them for the balance sum at or about that time or any time thereafter. More than one year later, on January 30, 1982, an associate company of the plaintiffs, Exim Agencies Pte. Ltd. ("Exim") agreed in writing to sell to the defendants 188 bags of Turkish gallnuts for a total sum of \$53,942.40 ("the second transaction") and the contract for such sale was negotiated and concluded by PW 1, who is also a director of Exim, through the agency of a broker, PW 2. The invoice or bill dated February 11, 1982 for the sale, however, was by mistake made out in the name of the plaintiffs as the vendor. When this mistake was later discovered, PW 1 attempted to rectify it but was informed by the broker that the defendants considered it not necessary as the defendants would be paying the bill to and in the name of the plaintiffs. The defendants then issued to the plaintiffs a cheque for the sum of \$46,438.70 post dated to February 27, 1982 which was met on due date, thus leaving a balance sum of \$7,505.70 unpaid. A receipt for the sum of \$46,438.70 was issued by and in the name of the plaintiffs to the defendants.

Thereafter, correspondence passed between the respective solicitors for the plaintiffs and the defendants relating to the claim by the plaintiffs for the amount of \$7,505.70. The defendants took the stand that the contract in respect of the

A second transaction was made with the plaintiffs who, so they alleged, were indebted to them in an equivalent amount as the balance of the purchase price for the Cummin seeds sold to the plaintiffs in January 1981 and hence no amount was due or owing to the plaintiffs. Initially, the solicitors for the plaintiffs, who are also solicitors for Exim, maintained that the contract in respect of the second transaction was made between Exim and the defendants. However, at a later stage they accepted the position that the contract was made between the plaintiffs and the defendants, and on behalf of the plaintiffs they demanded from the defendants payment of the amount of \$7,505.70; see pp. 67 – 69 of the Record of Appeal.

Subsequently as no payment was made, action for recovery of the amount was instituted by the plaintiffs in the District Court, claiming for the amount as the balance of the purchase price for the Turkish gallnuts sold by the plaintiffs to the defendants in the second transaction. The defence, consistent with the stand taken by defendants previously, was that no such amount was due or owing to the plaintiffs as the amount had been set off by an equivalent amount owed by the plaintiffs to the defendants as balance of the purchase price for the Cummin seeds sold in the first transaction. At the hearing of the action before the learned District Judge, the following were agreed between the parties, namely:

- F (a) there was only one issue before the Court: whether there was a set-off against the amount claimed by the plaintiffs, and
- (b) the contracting parties to the second transaction were the plaintiffs and the defendants.

G At the close of the case for the plaintiffs, counsel for the defendants elected not to call any evidence and submitted that the plaintiffs had not established their case. He argued (so it appeared from the Record) that the contract for the second transaction was made between Exim and the defendants. The learned District Judge held that the contract was made between Exim and the defendants and the plaintiffs were not "a party, privy to this contract", and there was no evidence of any novation of the contract. He said:

I "In the circumstances, I am therefore unable to find that the contract between EXIM and the defendant company had been novated. To my mind, what had been pleaded by the defendants – that of set-off, was clearly on the basis that the plaintiffs were Panachand & Company Pte. Ltd. and the defence cannot be estopped from raising the issue on the proper party to sue."

In my judgment, the learned District Judge with respect erred in law. First, the parties were bound by their pleadings and by their agreement expressly made in Court. In the defence, the defendants pleaded that the sum of \$7,505.70 claimed by the plaintiffs as the purchase price of the goods sold and delivered in the second transaction was not due, as it had been set-off by an equivalent amount owed by the plaintiffs to the defendants, as the balance of the purchase price of the goods sold in the first transaction. The defendants therefore by necessary implication conceded that (i) there was a contract for the sale by the plaintiffs to the defendants of the Turkish gallnuts in the second transaction and (ii) the balance of the purchase price amounting to \$7,505.70 had not been paid but had been set off by an equivalent amount due from the plaintiffs to the defendants arising from the first transaction. In other words, the defendants accepted that the plaintiffs were a party to the contract in the second transaction. Secondly, before the learned District Judge, counsel for the plaintiffs and the defendants accepted that the parties to the contract were the plaintiffs and the defendants and that the only issue before the Court was whether there was a set-off by an equivalent amount alleged to be due from the plaintiffs to the defendants.

In view of the pleadings and the agreement reached, the only issue to be enquired and decided upon is whether there was an equivalent amount due from the plaintiffs to the defendants which the latter purported to set off. That issue the Court must decide. Parties are bound by their pleadings and by the agreement or admissions made in Court; the Court cannot decide on issues not raised in the pleadings: see *Kiaw Aik Hang Ltd. v. Tan Tien Choy*.⁽¹⁾ In the circumstances it is not open to counsel for the defendants to resile from what he had agreed, *i.e.* that the plaintiffs and the defendants were the contracting parties, and argue (as he appeared to have done) that it was Exim, and not the plaintiffs, who had sold the Turkish gallnuts to the defendants in the second transaction.

I find myself also in disagreement with the learned District Judge on his finding that there was no novation of the contract in the second transaction. On the facts before the Court it was established that initially the contract was made between Exim and the defendants. Subsequently, the invoice or bill in respect of the sale was issued in the name of the plaintiffs by mistake. Nevertheless, the defendants accepted the plaintiffs as the

A contracting party, and PW1's attempt to correct the error was not successful and he did not pursue the matter further. It should be noted that in this connection PW 1 acted as a director of Exim and also of the plaintiffs; and he it was who negotiated and concluded the two transactions with the defendants. Subsequent to the issue of the invoice or bill the defendants paid to the plaintiffs to account the sum of \$46,430.70 and the receipt therefor was issued by the plaintiffs: see pp. 65 and 66 of the Record. Plainly the parties, namely: Exim, the plaintiffs and the defendants, must be taken to have agreed that the contract was to be treated as having been made between the plaintiffs and the defendants; there was a novation of the contract and the parties intended that the contract was between the plaintiffs and the defendants. Just before the action commenced the solicitors for the plaintiffs who were also solicitors for Exim elected by their letter of August 6, 1983 to accept the plaintiffs as the contracting party who sold the Turkish gallnuts to the defendants. Consistent with this stand, the action for recovery of the amount unpaid was initiated by the plaintiffs and consistent with this stand also, the defendants by their defence pleaded only set-off as a defence; there was no other defence.

On the basis of the pleadings and the agreement reached between the parties in Court, the burden of establishing the set-off rested squarely with defendants. The defendants had the right to begin and should have exercised the right. But that they did not do. Further, the defendants by their counsel elected at the close of the case for the plaintiffs not to call any evidence to show the amount alleged to be due from the plaintiffs to the defendants arising from the first transaction. There was no evidence of any such amount so due and accordingly, the defendants had failed to discharge the burden. In the circumstances judgment should be given to the plaintiffs and I have so ordered.

H In conclusion, I should add that I do not consider it fair to the plaintiffs to order a new trial of this action before another District Judge. The defendants had every opportunity of establishing their defence of set-off before the learned District Judge, assuming that they had the evidence in support; they failed to do so. I see no reason why they should be given a second chance.

Appeal allowed.

Solicitors: *Khattar Wong & Partners; Mallal & Namazie.*